

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

ALVIN D. MOANING ,

Plaintiff,

:

Case No. 3:11-cv-261

-vs-

District Judge Timothy S. Black
Magistrate Judge Michael R. Merz

:

OFFICER DAN ZWIESLER, et al.,

Defendants.

ORDER UPON ENTRY OF APPEARANCE OF COUNSEL

This case is before the Court on Notice of Appearance of R. Mark Henry as counsel for Plaintiff (Doc. No. 15). Processing of this case has been substantially delayed by referral to the Volunteer Lawyers Project for consideration of appointment of counsel, but that process is now complete.

Upon initial filing, the Magistrate Judge conducted a review of the Complaint under the Prison Litigation Reform Act of 1995 Title VIII of P.L. 104-134, 110 Stat. 1321(effective April 26, 1996)(the "PLRA") and concluded that the Complaint adequately stated claims upon which Plaintiff could proceed against Defendants Ohio Highway Patrol Trooper Payne, Dayton Police Officer Zwiesler, and Dayton Police Chief Richard Biehl (Report and Recommendations, Doc. No. 10, PageID 47-50). As to those three Defendants, the Court ordered "the Clerk shall issue process and deliver it to the United States Marshal who shall make service, provided proper summons, copies of the Complaint, and Marshal 285 forms are furnished to the Clerk by Plaintiff." *Id.* at PageID 50. The docket does not indicate that any such process has issued.

Under Fed. R. Civ. P. 4(m), process must be served within 120 days of filing the Complaint.

In this case, the deadline would have been November 24, 2011. The Court has foregone enforcement of Rule 4(m), based on review by VLP and cooperating counsel, but now sets the deadline for issuance of process at February 1, 2012. The Marshal is ordered to complete service promptly thereafter.

Currently pending are an original Report and Recommendations (Doc. No. 10) and a Supplemental Report and Recommendations (Doc. No. 13). They recommend dismissal of the claims against the City of Dayton, the fourth Defendant, without prejudice for failure adequately to plead a claim for relief under 42 U.S.C. § 1983; dismissal would be without prejudice because the Magistrate Judge assumed it might be possible to properly plead a claim against the City. They likewise recommend dismissal with prejudice of the claims against the Ohio Highway Patrol Department because any such claims are barred by the Eleventh Amendment.

Plaintiff's counsel has indicated informally his intention to file an amended complaint. The Court hereby sets a deadline of February 1, 2012, for the filing of an amended complaint. That event will render technically moot the pending Reports and Recommendations. However, counsel should consider the positions taken by the Magistrate Judge in those documents in preparing the amended complaint.

December 30, 2011.

s/ **Michael R. Merz**
United States Magistrate Judge